Supreme Court, U.S.
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No. 93-880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMAN CENTER FOR CHOICE, INC.,
EPOC CLINIC, INC., and CENTRAL FLORIDA
WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF FOR PETITIONERS

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2-1PP

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

ARGUMENT 1

I.

THE INJUNCTION IS NOT PRECISELY TAILORED TO ACCOMPLISH THE PIN-POINTED OBJECTIVE PERMITTED BY CONSTITUTIONAL MANDATE AND THE ESSENTIAL NEEDS OF THE CASE 2

A. The 1993 Injunction Is Not Essential To Preserve Public Order Or Privacy Because Petitioners Never Violated The 1992 Injunction 5

1. Petitioners as a group 7

2. Petitioner Madsen individually 9

3. Petitioner Martin individually 10

4. Petitioner Hobbs individually 11

B. The Injunction Is Not Precisely Tailored To The Exact Needs Of The Case 11

1. The thirty-six foot zone 13

2. The sounds and images prohibition 15

3. The three-hundred foot zone around the Clinic 17

4. The three-hundred foot zone around residential areas 18

5. The invited contact prohibition 18

CONCLUSION 20

TABLE OF AUTHORITIES

PAGE

CASES:

Alexander v. United States, 113 S.Ct. 2766 (1993) 4

Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987) 4

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 4

Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978) 13

Boos v. Barry, 485 U.S. 312 (1988) 3

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 2

Brandenburg v. Ohio, 395 U.S. 444 (1969) 11

Bray v. Alexandria Women's Health Clinic, 113 S.Ct. 753 (1993) 12

Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968) 3, 5

Chase National Bank v. City of Norwalk, 291 U.S. 431 (1934) 4

Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993) 1, 3

City of Houston v. Hill, 482 U.S. 451 (1987) 20

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 4

Forsyth County v. Nationalist Movement, 112 S.Ct. 2395 (1992) 3, 20

Frisby v. Schultz, 487 U.S. 474 (1988) 17, 18

Gregory v. City of Chicago, 394 U.S. 111 (1969) 18

Gunn v. University Committee to End War in Viet Nam,
399 U.S. 383 (1970) 14

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 20

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 17

Memphis Light, Gas & Water Division v. Craft,
436 U.S. 1, 8 (1978) 19

Meyer v. Grant, 486 U.S. 414 (1988) 16

Milk Wagon Drivers Union of Chicago, Local 753 v.
Meadowmoor Dairies, 312 U.S. 287 (1941) 5

Morales v. Trans World Airlines, Inc.,
112 S.Ct. 2031 (1992) 4

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 2, 4-6, 20

National Socialist Party of America v. Village of Skokie,
432 U.S. 43 (1977) 4

Near v. Minnesota, 283 U.S. 697 (1931) 4

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) . . . 4

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) . . . 4, 19

NLRB v. Baptist Hospital, Inc., 442 U.S. 773 (1979) 12

Organization for a Better Austin v. Keefe,
402 U.S. 415 (1971) 4, 12

Peel v. Attorney Registration & Disciplinary
Commission of Illinois, 110 S.Ct. 2281 (1990) 2

Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945) 14

Rizzo v. Goode, 423 U.S. 362 (1976) 4

Sampson v. Murray, 415 U.S. 61 (1973) 4

Schneider v. State, 308 U.S. 147 (1939) 16

Shelton v. Tucker, 364 U.S. 479 (1960) 3

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) . . . 4

Spence v. Washington, 418 U.S. 405 (1974) 20

Texas v. Johnson, 491 U.S. 397 (1989) 20

United Mine Workers of America v. Gibbs,
383 U.S. 715 (1966) 4, 5

United States v. Dixon, 113 S.Ct. 2849 (1993) 4

United States v. Grace, 461 U.S. 171 (1983) 17

United States v. Kokinda, 110 S.Ct. 3115 (1990) 14

Vance v. Universal Amusement Co.,
445 U.S. 308 (1980) 4

Walker v. City of Birmingham, 388 U.S. 307 (1967) 4

Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) 5

Zenith Radio Corp. v. Hazeltine Research, Inc.,
395 U.S. 100 (1969) 14

OTHER AUTHORITIES:

Blasi, *Toward a Theory of Prior Restraint: A Central Linkage*, 66 Minn. L. Rev. 11 (1981) 4

Fed. R. Civ. P. 65 . . . . . 4, 14

ARGUMENT

Respondents and their *amici* defend the Injunction by ignoring its actual terms. They argue that the historical context justifies any of its infirmities. Respondents then create a straw man argument by resorting to facts not in evidence,[1] distorting facts, and lumping

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[1] No evidence supports Respondents' assertions that Petitioners harassed staff at their homes, that public transportation does not visit the Clinic, that patients were stalked by Petitioners, that the Injunction was issued after repeated violations by Petitioners, that a leafletter can come within a few inches of a car outside of the thirty-six foot zone, that surgery now occurs only on Wednesday and Saturday, or that the court in *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993), lacked evidence that the judge intended the Injunction to be enforced through civil contempt process. Respondents' Brief (hereinafter referred to as R.B.) 7, 10, 14, 19, 34, 35. Contrary to *amici*, Center for Reproductive Law & Policy, et al., there is no evidence that Petitioners threatened and shouted in the faces of patients and staff, called patients' family members, employees, and acquaintances, or the IMPACT team trained to harass, intimidate, stalk staff and patients, and blockade. *Id.* at 5, 12, 28. Contrary to *amici*, People for the American Way, et al., it is inaccurate to state that the Florida Supreme Court reviewed only the Injunction order, that no contempt convictions occurred as a result of the 1993 Injunction, or that Petitioners threatened, harassed, intimidated, and obstructed the Clinic. *Id.* at 10, 11, 13. Contrary to *amici*, United States, there is no evidence the Clinic erected a fence and a wall to exclude noise. *Id.* at 22 n.11. Contrary to *amici*, National Organization for Women, et al., there is no evidence Dr. Gunn was murdered by an affiliate of Rescue America, that Petitioners engaged in trespass, stalking, threats of physical harm, phone jamming, along with criminal and civil violations, that Michael Griffin was a member of Rescue America, that the 1992 injunction was repeatedly violated by Petitioners, or that Petitioners engaged in violent acts. *Id.* at 1, 5, 6, 25-27. Contrary to *amici*, American College of Obstetricians and Gynecologists, et al., there is no evidence that a sign can be seen only if displayed over a fence. *Id.* at 19, 30. Contrary to *amici*, State of Florida, et al., there is no evidence Operation Rescue America is a successor to Operation Rescue, that the IMPACT team was organized by Madsen and Martin, that the Injunction prohibits only signs from ladders, or that noise was created by Rescue America. *Id.* at 3, n.2, 4, 5, 23, 27.

Petitioners with a parade of horribles.[2] Viewed in the absence of hysteria, the Injunction must be dissolved.[3]

I.

THE INJUNCTION IS NOT PRECISELY TAILORED TO ACCOMPLISH THE PIN-POINTED OBJECTIVE PERMITTED BY CONSTITUTIONAL MANDATE AND THE ESSENTIAL NEEDS OF THE CASE.

Respondents carelessly gloss over the extremely important threshold question of the constitutional standard governing speech-restrictive injunctions. This Court has cautioned that an injunction

> issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." . . . In other words, the order must be tailored as precisely as possible to the exact

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[2] Respondents point to the accosting of Doyle's children at her home. Such conduct is clearly reprehensible but it had nothing to do with Petitioners. If the judge tried to aim the Injunction at that type of conduct, he missed and instead struck Petitioners.

[3] Before the Florida Supreme Court, Petitioners requested review on its face and as applied, and at oral argument requested *de novo* review. Stating that its "own review of the record" showed the Injunction was supported by "competent, substantial evidence," the Florida Supreme Court purported to review the evidence. Pet. App. A-12. This Court has authority to undertake its own *de novo* review. *See, e.g., Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 110 S.Ct. 2281, 2291-92 (1990); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n.50 (1982).

> needs of the case.

Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 183-84 (1968) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

Respondents argue the Injunction is content neutral. However, they concede not all images are prohibited but only those tending to "traumatize," the gag rule of Section (5) should be changed to a hecklers' veto, and the word "encouraging" should be stricken from Section (9). R.B. 24, 34, 42 n.33, 43; J.A. 79-80. These concessions prove the Injunction is content-based. A listener's "reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 112 S.Ct. 2395, 2404 (1992); *see also Boos v. Barry*, 485 U.S. 312, 321 (1988) (emotive impact of speech is not unrelated to content).[4] Moreover, Respondents' admission that the Injunction *permanently* removes pro-life speech to the other side of Dixie Way, while allowing pro-choice speech on the sidewalk, underscores the fact that it is content-based. R.B. 23. *See* Petitioners' Brief 8-20.

Free speech necessitates a heavy presumption against, and a demanding review of, anti-speech injunctions. *See amici* briefs of AFL-CIO 6-24; and Operation Rescue, et al. Injunctions against

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[4] Respondents criticize the finding in *Cheffer*, 6 F.3d at 705, that the Injunction was viewpoint based. R.B. 18, 21. On the one hand, Respondents argue that the Injunction is content neutral because it does not mention abortion in Sections (1) through (9), but by admitting the intent of the Injunction was to prohibit images that "traumatize." Respondents' admission supports the reasoning of *Cheffer*. A political or birthday sign would not be prohibited under Respondents' rationale, but a sign with the words "Baby Killer" could "traumatize" someone associated with the Clinic and would therefore be banned. The trial court acknowledged that the Injunction applies to any activities that seem "to be supportive of pro-life." J.A. 72.

expressive activity require heightened scrutiny.[5] Because injunctions restrict *future* expression, they are subject to the prior restraint doctrine which places a heavy presumption against their validity. Prior restraints on speech "are the most serious and the least tolerable infringement," because, unlike criminal or civil sanctions chilling speech, a prior restraint "freezes" speech. *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).[6] This Court's precedents suggest that injunctive relief involving speech mixed with conduct must (1) not issue unless a legal wrong has been proven and existing law is inadequate;[7] (2) be limited to restraining illegal activities of those responsible for the illegal conduct;[8] and (3) serve an essential governmental purpose unrelated to expression

[5] *See, e.g., Alexander v. United States*, 113 S.Ct. 2766 (1993); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Near v. Minnesota*, 283 U.S. 697 (1931); *see also* Blasi, *Toward a Theory of Prior Restraint: A Central Linkage*, 66 Minn. L. Rev. 11 (1981).

[6] The collateral bar rule prevents the speaker from ignoring the injunction and later challenging it in court. *Cf., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

[7] *See, e.g., United States v. Dixon*, 113 S.Ct. 2849, 2855 (1993); *Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031, 2035 (1992); *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *Sampson v. Murray*, 415 U.S. 61 (1973); Fed. R. Civ. P. 65.

[8] *See, e.g., Claiborne Hardware Co.*, 458 U.S. at 924 n.67; *Rizzo v. Goode*, 423 U.S. 362 (1976); *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 731-32 (1966); *Chase National Bank v. City of Norwalk*, 291 U.S. 431 (1934).

and be precisely tailored to the exact needs of the case.[9] Judged accordingly, the Injunction must fail.

A. The 1993 Injunction Is Not Essential To Preserve Public Order Or Privacy Because Petitioners Never Violated The 1992 Injunction.

Though the trial court acknowledged that some protesters had no "obvious relationship to others," the Injunction impermissibly lumped all protest activities monolithically as "Operation Rescue."[10] J.A. 51; Pet. App. A-3. Such "guilt by association is philosophically alien to the traditions of a free society and the First Amendment itself." *Claiborne Hardware Co.*, 458 U.S. at 932.[11]

[9] *See, e.g., Claiborne Hardware Co.*, 458 U.S. at 886; *Carroll*, 393 U.S. at 175; *Gibbs*, 383 U.S. at 731-32; *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 139 (1957); *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287 (1941).

[10] *Operation Rescue* was founded by Randall Terry. J.A. 340. *Operation Rescue National* was founded by Keith Tucci and operates the IMPACT training program. J.A. 42, 334, 335, 338, 340, 341, 379. *Rescue America* is an organization under the leadership of Don Treshman. J.A. 394. Though named as a party, *Operation Rescue America* never existed. J.A. 379, 393-94. 407. Though also named as a party, *Operation Goliath* is not an organization but was a campaign under the direction of Bruce Cadle which ceased in 1992. J.A. 322-23, 327.

[11] Though the 1992 injunction finds Petitioners are members of Operation Rescue and Operation Rescue America, the record testimony for the 1993 modification of that injunction established: (1) Petitioners were not members of Operation Rescue; (2) there was no organization called Operation Rescue America; and (3) Madsen, Martin and Hobbs were members of Rescue America which is separate and distinct from Operation Rescue. If it was uncontroverted that Petitioners were members of Operation Rescue, the statement made by counsel for Respondents is unexplainable: "Your Honor, I've said it more times than I can count. We are not seeking at this juncture to tie [Petitioners] to Operation Rescue. If

An injunction must "restrain only unlawful conduct and the persons responsible for conduct of that character." *Id.* at 924 n.67. In this case Petitioners engaged in no unlawful conduct.[12]

[Attorney Weiss] wants to represent Operation Rescue, that's a different matter. But as of right now, that distinction has been made clear, I think, throughout the examination of this witness." J.A. 198. As for the existence of Operation Rescue America, all the testimony before the trial court showed there was no such entity, but there was a Rescue America. J.A. 182, 379, 394-95, 407-08. When counsel for the Clinic learned of same, counsel stated, "We may need to take an amendment to conform with the evidence." J.A. 408. Respondents suggested the Injunction be amended to include the name Operation Rescue National, but that amendment was not adopted by the court. J.A. 79.

Judge McGregor was confused and had a problem "identifying for enforcement purposes . . . a proper legal entity that the court can subsequently deal with if there is [a] violation. And, I have a problem right now." J.A. 142. He remarked that it was "very troublesome dealing with organizations that are not legal entities." J.A. 168. He asked whether Operation Rescue was different than Operation Rescue America and was told by counsel there "isn't an Operation Rescue America. There's an organization Rescue America." J.A. 182. Twice the court asked Attorney Weiss who he represented, and was informed his clients were Rescue America, Madsen, Martin and Hobbs. J.A. 167, 579. At one point the court assumed that Meredith Raney was a defendant and began to introduce evidence against him, but then was informed he was not a defendant and was not a member of any of the organizations. J.A. 164, 185. Dr. Snydle testified that he felt, "They're all the same. It doesn't matter . . . . They're all one organization." J.A. 214. When asked if he based his feeling that they were all one organization on the assumption they were opposed to abortion, Snydle responded, "That is correct." J.A. 214. The organizational entities and their differences were explained on a number of occasions. J.A. 167, 182, 279, 323, 327, 334-40, 378-385, 394, 407-08, 427, 459.

[12] Even if Petitioners were members of Operation Rescue, which they deny, it is irrelevant because there was no showing that Operation Rescue undertook illegal activity, or that Petitioners actively advocated illegal aims. *See Claiborne Hardware Co.*, 458 U.S. at 920.

In 1991, after pro-life activity increased in Wichita, Kansas, Petitioner Martin issued a press release stating that "the spirit of Wichita comes to Florida." Respondents moved for a preemptive strike and obtained a TRO which prohibited blocking access to the named clinics. In July 1992, the parties stipulated that Petitioners never attempted to block access to any of the clinics. On September 30, 1992, the TRO became a permanent injunction.

The issue is whether Petitioners' activity *after* September 30, 1992, justified the entry of the Amended Permanent Injunction on April 8, 1993. Two events occurred during this period, neither of which relate to Petitioners. Operation Rescue National began the IMPACT Training School on or about January 18, 1993. J.A. 247. This school was to last twelve weeks, and as part of this training, individuals were invited to speak by Operation Rescue National, namely Randall Terry, Pat Mahoney, and others, none of whom were related to Petitioners. J.A. 342-45. Then on or about March 10, 1993, Dr. David Gunn was tragically killed in an unrelated incident at an abortion clinic in Pensacola, Florida. Respondent Aware brought two motions: (1) motion to hold in contempt those who had violated the 1992 injunction; and (2) motion to modify the 1992 injunction. The issue to be determined was whether Petitioners and other named defendants had violated the 1992 injunction such that it needed to be modified. As shown below, Petitioners never violated the 1992 injunction.

1. Petitioners as a group.

The trial court never made a specific finding that Petitioners violated the 1992 injunction. The Injunction states that despite the 1992 injunction, "there has been interference with ingress" by "some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not." J.A. 50-51. The order continues by noting: "Other persons would be standing, kneeling and sitting on the unpaved shoulder of the public right-of-way." J.A. 51. The findings never mention Petitioners or Rescue America by name. The Injunction is completely devoid of any finding that Petitioners

violated the 1992 injunction.

Cadle, Unterberger, Martin, and Allgeyer all testified that the IMPACT team was associated with Operation Rescue National and had no association with Petitioners. J.A. 279, 334, 335, 338, 340-44, 394, 427, 459, 494-95. The videotape[13] of the picketing on February 20, March 8, and March 13, 1993, did not show Petitioners or anyone affiliated with Rescue America. J.A. 395. Respondents stated that Arick's testimony involving the videotape "does not go against" Petitioners, J.A. 549, and stipulated that Arick "has no testimony on any violations on behalf of any of [Petitioners]", J.A. 578. Respondents further stated "we had nothing to present on any of [Petitioners]", J.A. 578-79, and that it has "been stipulated" that none of Petitioners have been charged with any crime. J.A. 591-92. Respondents added, "I also point out that all [of Arick's testimony regarding the videotape] is not something that relates to [Petitioners]." J.A. 602.

During Doyle's testimony regarding her apartment being picketed, Respondents stated that she "has not testified to any manner involving [Petitioners] in connection with these demonstrations," J.A. 507, that Doyle was "not going to testify as to [Petitioners]," J.A. 494, and that the testimony of Doyle had nothing to do with Petitioners but was directed to the IMPACT team and Cadle. J.A. 494-95.

During Snydle's testimony, Respondents stated they were not trying to link Petitioners with Operation Rescue. J.A. 198. Snydle

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[13] Ruth Arick, employed by Aware and paid by The Feminist Majority, testified that six to eight hours of video were edited under her discretion. J.A. 529, 531, 533. The video at the Clinic was taken on a day when Randall Terry of Operation Rescue and Eleanor Smeal of The Feminist Majority were present for a media heyday. J.A. 543, 559, 588. The tape was edited to focus on only "the kinds of activities that seem to be some of the most menacing and harassing" and stated that she left out pro-life singing and prayer, because such was not threatening, harassing, or intimidating. J.A. 595-97.

testified that he did not see Petitioners at the Comfort Inn. J.A. 173. In fact, the testimony of Snydle had little to do with Petitioners, as counsel stated, "there are other people against whom we are seeking contempt." J.A. 161. The so-called warning poster did not pertain to Petitioners. J.A. 163-64, 171.

During Captain Allgeyer's testimony, Respondents represented that Petitioners were not part of any traffic citations and were not involved in running motor vehicle license checks. J.A. 267, 307. Allgeyer testified that Petitioners had never been charged with trespass and does not recall seeing them at the Clinic. J.A. 275, 310. During Cadle's testimony Respondents stated that none of his testimony related to Petitioners. J.A. 331, 375.

2. Petitioner Madsen individually.

Petitioner Madsen did not testify during the 1993 hearing because counsel for the Clinic stated, "**I have already said that Judy Madsen is not a target of these contempt proceedings.**" J.A. 375 (emphasis added). Snydle testified Madsen had not been seen at the Clinic and had never blocked access. J.A. 192-93, 211. After the Clinic rested its case, counsel for Petitioner Madsen stated the following:

> WEISS: With respect to, I believe there has been a stipulation that Mrs. Madsen has not violated any of the court's injunction whatsoever. If I have got that cleared then --
>
> THE COURT: That's my understanding.

J.A. 436. Respondents acknowledged, and the court understood, that Madsen never violated the 1992 injunction. Yet, Judge McGregor carelessly lumped her in the Injunction knowing that she never engaged in illegal conduct. Injunctive relief against Madsen is blatantly unconstitutional.

3. Petitioner Martin individually.

Martin testified that he never trespassed, blocked access, or directed others to do so. J.A. 423-34. He never broke the 1992 injunction and does not feel that it is contrary to God's law because it allows for expressive activities. J.A. 430. He never saw Dr. Snydle or threatened him and has never been associated with Operation Rescue, Operation Goliath, Operation Rescue America, or Operation Rescue National. J.A. 426. He is not a part of the IMPACT team and has not been at the Clinic in two to three years. J.A. 427. Cadle confirmed that Martin never violated the 1992 injunction and had not seen Martin at the Clinic in more than two years. J.A. 376, 378.

One question raised against Martin was whether he distributed a brochure of Rescue America after the September 30, 1992 injunction, and if so, whether it advocated blocking access to the Clinic. Martin testified that Rescue America has four doctrines, the fourth being a rescue, but he subscribes to the first three which do not involve blocking access. J.A. 396. A portion of the brochure, which he did not write, stated that by blocking access to the entrance of an abortion clinic, the rescuer puts her body between the abortionist and the intended victim. J.A. 403-04. This brochure was published prior to the 1992 injunction. J.A. 423. Though it is disputed, Martin testified he did not distribute it after that injunction. J.A. 423, 429. He advocates prayer and never advocated blocking access to a clinic. J.A. 423-25. The brochure itself does not incite others to block access. Counsel for the Clinic confessed "some lack of clarity in the record in this respect," J.A. 441, and conceded there was "some confusion." J.A. 442.

Thus, the only allegations against Martin were whether he, on one occasion, stood in a driveway when Snydle tried to enter the Clinic,[14] and whether a brochure published prior to the 1992

[14] Snydle alleges he saw Martin at the Clinic. J.A. 144, 156, 211. Though he alleged Martin attempted to block the driveway, when asked specifically what Martin purportedly did, he responded, "He was walking back and forth across the parking lot entrance. And, as I tried to get in with my car, everybody just sort of stood there. I blew my horn several times and then progressed." J.A. 211. Snydle admitted that Martin had never assaulted him. J.A. 195.

injunction was distributed after the injunction, and if so, whether it incited blocking clinics. Martin testified he had not visited the Clinic and did not distribute the brochure after the 1992 injunction. J.A. 429. Even if he was at the Clinic, the evidence does not support blocking access and the brochure does not incite others to do so. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969). The Injunction fails constitutional scrutiny.

4. Petitioner Hobbs individually.

Petitioner Hobbs never testified during the 1993 hearing. There was no need to because she did not violate the 1992 injunction. Only Captain Allgeyer testified regarding Hobbs. At one time he stated that Hobbs had received a traffic citation. J.A. 275, 276. However, when he made that statement, he was referring to a woman in the courtroom by the name of Shirley whom he looked at during the statement. On cross-examination, he acknowledged he did not know Shirley Hobbs but was referring to the Shirley sitting in the courtroom, who in fact was not Shirley Hobbs. Hobbs was not present. J.A. 285, 288. During Allgeyer's testimony, Respondents stated that Petitioners were not part of any traffic citation. J.A. 267. Allgeyer also testified the Petitioners had not trespassed or obstructed access. J.A. 275. There is no testimony implicating Petitioner Hobbs whatsoever. The Injunction against Hobbs is clearly unconstitutional.

B. The Injunction Is Not Precisely Tailored To The Exact Needs Of The Case.

According to the Florida Supreme Court, the asserted interests underlying the Injunction involve protecting abortion rights, insuring the public safety and order in promoting free flow of traffic, and protecting property rights. Abortion is a right protected only

against *governmental* interference. *See Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753, 762, 764 (1993). No governmental entity is a party to this case. The conflict is between private parties. Abortion is not among the few rights protected against "private as well as official encroachment." *Bray*, 113 S.Ct. at 764. This Court has stated:

> It would be most peculiar to accord [abortion] that preferred position, since it is much less explicitly protected by the Constitution than, for example, the right of free speech . . . . Moreover, the right to abortion has been described in our opinions as one element of a more general right of privacy, or of Fourteenth Amendment liberty; and the other elements of those more general rights are obviously not protected against private infringement.

Id. (citations omitted).

Constitutional rights are protected only against governmental intrusion, cannot be asserted by Respondents, and therefore cannot be used to justify an underlying interest for the Injunction. *See amicus* brief of National Right to Life Committee, Inc. A department store cannot obtain an injunction against a burglar and raise Fourth or Fourteenth Amendment rights as justification for the injunction. Since the parties are private, it is impermissible to use constitutional rights to justify the underlying interest. Consequently, *this case is not about abortion rights*. Even if the Clinic could rely on the right to privacy, there is no evidence that the Clinic was closed, or that any person was permanently prevented from receiving an abortion. J.A. 54.[15]

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[15] Invasion of privacy is not sufficient to enjoin peaceful speech. *Keefe*, 402 U.S. at 419-20. Respondents and their *amici* argue for increased restrictions around medical facilities. R.B. 30-31. However, *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979), specifically noted that the prohibition of *solicitation* and distribution did not extend to the hospital's parking lots but applied only to areas *within* the buildings. 442 U.S. at 777 n.5. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), specifically allowed *solicitation* and distribution *within* the cafeteria. 437 U.S. at 502-05.

Though Respondents refer to stalking patients, they only cite to the Injunction, which contains an erroneous finding since there is no testimony that any patient was ever stalked. J.A. 55; R.B. 10. As for the interest in property rights, Captain Allgeyer testified that Petitioners never trespassed or obstructed access. J.A. 275. No arrests and no citations have ever been issued for blocking access. J.A. 289-90. Allgeyer stated that the Melbourne police were competent to do their job, had enough personnel, and could handle the situation. J.A. 277-78. He also testified that in all of the newsclips he viewed, he never observed any illegal activity. J.A. 279.

By the testimony of the Clinic's own witnesses, Respondents' interest is to prohibit blocking access, threats, harassment, and intimidation. J.A. 597. Arick was not concerned with prayer or singing because these forms of speech were not threatening, harassing, or intimidating. J.A. 596-97. Doyle concedes that walking, carrying signs and kneeling to pray is a constitutional right, that prayer does not scare her but that marching, yelling, and name calling scares her. J.A. 517. Dr. Snydle testified peaceful picketing using signs probably would not cause much emotional stress. J.A. 203. The only asserted interest offered is to prohibit blocking access and shouting. The 1992 injunction protects the former and a simple noise restriction prohibiting willful shouting or sound amplification would be sufficient. The Injunction is not precisely tailored.

1. The thirty-six foot zone.

The Florida Supreme Court noted that "the present parties agree" that the forum at issue in this case constitutes "a traditional

public forum." Pet. Cert. A-13.[16]

Section (3) prohibits Petitioners and anyone acting "in concert" from "entering that portion of the public right-of-way" contained within the thirty-six foot zone. J.A. 57.[17] Respondents argue that

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[16] Respondents assume the sidewalk is a public forum but suggest that it resembles the sidewalk in *United States v. Kokinda*, 110 S.Ct. 3115 (1990). R.B. 14 n.17. The sidewalk in *Kokinda* ran parallel to the post office and was physically attached to its exterior wall separating the building from the parking lot. The sidewalk in this case is not attached to the Clinic and is not on private property. It has been used for walking and expressive activity. J.A. 474-75. The plurality distinguished the access sidewalk from the curbside sidewalk. *Kokinda*, 110 S.Ct. at 3120.

[17] Judge McGregor intended the "in concert" provision of the Injunction to apply to any pro-life individual whether or not they were aiding and abetting. This is the obvious purpose of the generic "WARNING" sign he directed to be posted at the Clinic. J.A. 61. The judge's remarks at the April 12, 1993 hearing after the entry of the Injunction underscore his obvious intention to apply the Injunction to any activities that "seem to be supportive of pro-life." J.A. 72. The Injunction, therefore, permanently eliminates all pro-life expression from the public sidewalk and right-of-way within the thirty-six foot zone. The point which Petitioners have raised is not the constitutionality of Federal Rule of Civil Procedure 65, but the constitutionality of the "in concert" provision as written and applied by Judge McGregor. Petitioners' Brief 27 n.19. Judge McGregor's application of this provision enjoins the entire world from expressing pro-life views. This is how the enforcement officials understood its application and the reason why they attempted to intervene for clarification. J.A. 83-84. Such a broad application of the term "in concert" is unconstitutional because it violates free speech and association. The Injunction's overbreadth allows Petitioners to challenge it on its face. *See Gunn v. University Committee to End War in Viet Nam*, 399 U.S. 383, 388-89 (1970) (when injunction applying to those acting in concert is "too vague to be understood, it can be a deadly one"); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945) (a court "may not grant an enforceable order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according

Petitioners can still carry on speech outside the thirty-six foot zone along U.S. Highway 1, but Unterberger, who is a local traffic engineer, testified that the slope along U.S. Highway 1 is extremely dangerous. J.A. 479-80, 482-83. To increase the number of people along U.S. Highway 1 increases the risk. J.A. 483. Captain Allgeyer stated that it would be deadly to pass out literature along U.S. Highway 1 and that it was a violation of local law to carry a sign along the median. J.A. 298, 313.

Respondents then argue that the thirty-six foot zone merely removes Petitioners from the sidewalk to the other side of Dixie Way. In making this allegation, Respondents concede that the public sidewalk is reserved only for pro-choice speech. Unterberger testified that it would be impossible to carry on a dialogue or to hand out literature on the other side of Dixie Way. J.A. 486. The only way to convey a message outside the thirty-six foot zone would be to shout or display an image, but that is prohibited by Section (4). Without risking arrest it is impossible to hand out literature outside the thirty-six foot zone. In that the interest is to maintain free access, the thirty-six foot zone flat ban on speech is not precisely tailored to the exact needs of the case. The 1992 injunction meets that interest along with Sections (1) and (2) of the 1993 Injunction, but the thirty-six foot zone misses the mark.

2. The sounds and images prohibition.

The restriction against sounds in Section (4) prohibits singing, chanting, whistling, shouting, yelling, use of bullhorns, sound amplification equipment or other sounds. J.A. 59.[18] The

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to the law"); *see also amicus curiae* Brief of The Rutherford Institute 5-11.

[18] While clearly defined volume restrictions have been upheld under certain circumstances, the restriction on singing, chanting, whistling or other sounds is not precisely tailored to the exact needs of the case. If the Clinic is truly concerned about sounds, then those associated with the Clinic do not show it by their actions. Many of the pro-choice protesters were shouting and highly vocal. J.A. 473. The pro-choice protesters use

restriction on sounds and images is during "the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods." J.A. 59. The latter term is not defined. Respondents in the trial court acknowledged that the term was vague and requested that the court amend the Injunction to include "*(as posted at the Clinic)*." J.A. 79. Under the Injunction, it is impossible to determine when surgical procedures and recovery periods occur, and thus the Injunction acts as a total ban on any pro-life sound or image.

Respondents' Brief argues that Section (4) restricts only those images which can be observed when one climbs a ladder. R.B. 41 n.31. Respondents conceded during oral argument before the Florida Supreme Court that images can be observed within the Clinic without hoisting them over a fence. Respondents specifically requested the court to strike the words "images observable." J.A. 79. Until now, Respondents agreed that the term "images observable" should be removed.

As written, the Injunction restricts all pro-life images observable whether in or outside the forbidden zones. To say that the thirty-six foot zone merely moves pro-life speakers across the street ignores the restriction on images.[19] Respondents' contention

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bullhorns. J.A. 477. Moreover, the Clinic itself played loud music on its exterior. J.A. 273, 281, 282, 542, 545, 582, 597, 624.

[19] Respondents suggest that alternative means of communication exist because Petitioners can speak through advertisements, editorials, and distribute literature throughout other parts of Melbourne. R.B. 35-36. However, one "is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939). Petitioners have the "right not only to advocate their cause but also to select what they believe to be the most effective means of doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Respondents and their *amici* suggest that since Aware is the only abortion clinic in Melbourne, it should receive protection from picketing and that the captive audience doctrine should apply. The

is similar to an argument rejected by this Court when the government contended that the restriction against picketing on the sidewalks around the United States Supreme Court was reasonable because it only restricted picketing in the vicinity of the Court and the picketers could go elsewhere throughout Washington, D.C. *See United States v. Grace*, 461 U.S. 171, 180-81 (1983). Like the restriction in *Grace*, the Injunction "totally banned the specified communicative activity on the public sidewalks around" the Clinic. *Id.* at 181. It "cannot be justified as a reasonable place restriction." *Id.* Of what use is picketing in front of the wrong building? Offering a leaflet to someone who is far removed? To do so would be like addressing an audience with your back towards them or speaking with a gag over your mouth.

3. The three-hundred foot zone around the Clinic.

Section (5) creates a three-hundred foot zone around the Clinic and prohibits "physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring." J.A. 59. Invited conversation must be "of a non-threatening nature." Respondents argue that this is merely a traffic regulation, but there is no evidence there was a traffic problem three-hundred feet away from the Clinic. It is inconceivable how this three-hundred foot zone encompassing 6.49 acres of property has anything to do with traffic. This section

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fact it is the only clinic in Melbourne strengthens Petitioners' argument that it is not reasonable to force their speech to the other side of the city. Outside the context of a home, the captive audience doctrine has never been applied in a traditional public forum. Respondents' use of the captive audience doctrine outside of the context of a home within a traditional public forum would result in the extinction of public fora. The captive audience doctrine does not apply in a residential area to a business operating out of a home. *Frisby v. Schultz*, 487 U.S. 474, 488 (1988). The decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), does not extend the captive audience doctrine outside a home because that case involved political advertisements in a nonpublic forum. *Id.* at 303.

also prohibits sidewalk counseling, J.A. 59, which Wymer testified was peaceful communication. J.A. 612, 613. *See amicus* brief of The Southern Center for Law & Ethics. Respondents argue that "helpful" and "nonoffensive" sidewalk counseling is not prohibited. R.B. 42. While that may be their view, that is not what Section (5) says. All sidewalk counseling is prohibited unless the recipient shows a desire to communicate by approaching or inquiring. There is no justification for this restriction. It is not precisely tailored.

4. The three-hundred foot zone around residential areas.

Section (6) creates a three-hundred foot zone around the residence of any of the Clinic's employees, staff, owners or agents. J.A. 59-60. That section restricts approaching, congregating, picketing, patrolling, and demonstrating.[20] This restriction goes far beyond that permitted by *Frisby*, 487 U.S. at 474. Within this 6.49 acre silence zone no pro-life speaker can approach anyone to carry on peaceful pro-life speech or pass out literature. Petitioners never engaged in residential picketing. J.A. 494-95, 507. This restriction unconstitutionally prohibits peaceful and orderly marching. *See Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969). The Injunction is not precisely tailored.

5. The invited contact prohibition.

Outside the thirty-six foot zone the Injunction provides for "invited contact." J.A. 63. This restriction on speech extends far beyond the three-hundred foot zones. Invited contact is defined as conduct by the person sought to be contacted which "affirmatively indicates a desire to engage in conversation or to receive literature."

[20] Section (6) also prohibits attempting to block access to the entrances or exits of the residences. There is absolutely no evidence that ingress or egress to any residential area was ever blocked. Moreover, since Windle and Doyle, as owner and employee of the Clinic, live in an apartment and condominium respectively, this restriction shuts down an entire complex for pro-life speech.

J.A. 63. This affirmative indication can be evidenced by the person physically approaching or where such person extends a hand to receive literature or speaks words "indicating a positive interest." J.A. 63. After speech is initiated by the pro-choice speaker, speech can be silenced by withdrawing the license. There is absolutely no basis for this restriction. The Injunction cannot be considered precisely tailored to the exact needs of the case.[21]

Judged against this Court's precedents regarding injunctive relief involving speech, the Injunction is unconstitutional. Respondents cannot honestly represent that the Injunction is necessary to restrain Petitioner Madsen's activities when Respondents stipulated that the contempt hearing did not involve her. J.A. 375, 436. Petitioner Hobbs engaged in no illegal activity that required restraint on her speech. Petitioner Martin testified he was not at the Clinic, had not blocked access to the Clinic, and had not advocated others to do so. Even if the testimony of Snydle puts Martin at the Clinic on one occasion, his activities were not illegal. Even if Martin distributed the Rescue America brochure after the 1992 injunction, it does not incite illegal activities and he specifically repudiated blocking access. *See Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 8 (1978); *New York Times Co.*, 376 U.S. at 285.

The Injunction does not serve an essential governmental purpose involving privacy, property rights, or public order. The right of privacy cannot be raised as a governmental interest by private parties, and even if it could, Petitioners did not invade that right. Petitioners pose no property harm or threat to the public order. The 1992 injunction protects the Clinic. The 1993 Injunction challenged here violates precious freedoms. The Respondents would have this Court weaken the first amendment by

[21] Since injunctions must be precisely tailored to the exact needs of a case, they are not immune from vague and overbreadth challenges. The vague and overbreadth deficiencies of the Injunction point out that the Injunction is not narrowly tailored to the precise needs of the case. *See* Petitioners' Brief 24-37.

sanctioning the proposition of "hear no evil, see no evil, speak no evil." If "absolute assurance of tranquility is required, we may as well forget about free speech." *City of Houston v. Hill*, 482 U.S. 451, 462 n.11 (1987) (quoting *Spence v. Washington*, 418 U.S. 405, 416 (1974)) (editing remarks and citations omitted).

While dissidents elsewhere face legal sanctions of every stripe, in the United States the right to free speech belongs to the politically correct and incorrect, the disaffected as well as the loyal, the obnoxious as well as the sensitive, the vociferous as well as the meek. *See, e.g., Forsyth County*, 112 S.Ct. at 2395 (racist march); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (lewd parody); *Claiborne Hardware Co.*, 458 U.S. at 886 (aggressive boycott enforced with threats of ostracism). The Injunction at issue represents a dramatic betrayal of the national promise of liberty to speak, to protest, to challenge, to unsettle the status quo.

CONCLUSION

In light of the above, this Court should reverse the judgment of the Florida Supreme Court.

Respectfully Submitted,

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